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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 453

GERARD ROSENTHAL,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Directed to the Supreme Court of Tennessee.

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Directed to the Supreme Court of Tennessee.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Gerard Rosenthal, respectfully petitions this Court for a Writ of Certiorari to the Supreme Court of Tennessee.

OPINIONS OF THE TENNESSEE SUPREME COURT.

The Supreme Court on April 5, 1956, rendered two opinions; one for publication which appears at pages 1464-1475 of the record. This has been reported in 292 S. W. 2d 1-7.

(Advance Sheets for August 21, 1956). The other opinion not intended for publication appears in the record at pages 1422-1463.

Petitioner filed a Petition for Rehearing which is set out in the record at pages 1397-1415. The court's opinion, filed June 8, 1956, denying this petition, appears at pages 1478-1479 of the record.

The time in which the Petition for Writ of Certiorari may be filed was extended by Order issued by Justice Stanley Reed until September 26, 1956.

JURISDICTION OF THE COURT.

The jurisdiction of this Court is invoked under Section 1257 (3), Title 28, United States Code Annotated, and under Rule 22 (1) of the Revised Rules of this Court.

THE PRINCIPAL QUESTION INVOLVED.

The principal question involved is whether petitioner in his trial and sentence was denied due process as required by the Fourteenth Amendment to the Constitution of the United States.

SUMMARY STATEMENT OF ISSUES INVOLVED.

Petitioner, charged with murdering Richard Carter, was jointly indicted with one Michael Tuzzo, who was charged in a separate count of the indictment with being an accessory after the fact. A severance was granted and petitioner was tried alone.

On the verdict of the jury petitioner was sentenced to death by electrocution (R. 40).

Petitioner, 22 years old, a member of the United States Air Force at Greenville, Mississippi, was a friend of de-

ceased and they came to Memphis together in the car of the latter and registered together at the Madison Hotel under their own names (R. 77, Exs. 6 and 7—Webb). Petitioner had no acquaintances in the City of Memphis (R. 679).

Petitioner, in his service at the Air Base, was associated with Michael Tuzzo, who testified as a witness against him.

Petitioner had never been in any previous trouble and proved an excellent reputation for peace and quiet and for truth and veracity (R. 840, 855, 868, 873, 879, 926-1015).

Tuzzo's testimony was impeached by numerous witnesses who swore his reputation for truth and veracity was bad (R. 840).

Tuzzo admitted that he had made false statements about the homicide and many other matters (R. 311, 324, 362, 370).

Tuzzo testified that he was willing to kill for hire (R. 297, 299, 376, 377, 478); that he and petitioner planned the killing of Carter (R. 297-302); that Tuzzo in one plan was to be the "trigger man" (R. 299, 366, 387, 471); that Tuzzo furnished petitioner the pistol to be used for that purpose (R. 303, 366, 367, 387, 388).

Tuzzo was given assurances by some of the officers that if he would help them "get" (R. 390) Rosenthal, Tuzzo would probably be indicted as an accessory after the fact—the penalty being from one to five years—and that if he did not cooperate with them Tuzzo would be indicted for murder in the first degree. It is clear from Tuzzo's testimony on cross-examination that such a promise was made and Tuzzo's indictment as an accessory after the fact shows that it was kept (R. 389-390).

Tuzzo did not accompany petitioner and Carter to Memphis (R. 304). When arrested, Tuzzo told the officers at

Greenville, at Memphis, and also told his attorney that he had been informed by petitioner that the killing of Carter was accidental.

At some stage after Tuzzo had received a promise of immunity for cooperating with the officers, he changed his story and stated that he was informed by petitioner that petitioner had shot Carter while the latter was asleep (R. 308, 482).

There was no eyewitness to the tragedy.

Petitioner denied that he had killed Carter intentionally and denied that he admitted to Tuzzo that he shot deceased while the latter was asleep (R. 491, 783).

It was the theory of petitioner that the homicide was accidental, not intentional; that he had been engaged in a pillow fight with deceased, pillow fights between service men at the Greenville base being a common occurrence; that when petitioner came out of the bathroom with a pillow to throw at deceased, he saw the latter had a gun which he pointed at petitioner; that petitioner used his pillow to push this gun aside and it was accidentally discharged, killing deceased.

Petitioner was greatly alarmed and excited by this accident and left the hotel and returned to Greenville; upon arriving there he woke up Tuzzo, told him about the terrible accident and that he had left Tuzzo's pistol in the room with Carter; thereupon Tuzzo "blew his stack" and demanded that petitioner return with him to Memphis, get the pistol, and conceal the body of Carter, stating to petitioner that no one would believe his story that the killing was accidental (R. 679, 681, 684, 686, 783).

Following the suggestion or demand of Tuzzo, petitioner returned with him to Memphis. They obtained the pistol but were unsuccessful in removing the body of Carter.

To accomplish this purpose, Tuzzo registered at the hotel under the name of James Slater (R. 174, Ex. 1 Hooks, 311).

On their way from Memphis to Greenville, in accordance with instructions by the Squadron Commander at the base that they should communicate with him if they were involved in any trouble, petitioner attempted to telephone his Squadron Commander but that officer was on a cross-country trip (R. 321, 325, 693, 782, 783). When petitioner and Tuzzo arrived at the Air Base, they were placed under arrest. Petitioner waived extradition but Tuzzo refused to do this unless a certain designated officer was allowed to bring him to Memphis.

1) Following his arrest and return to Memphis, Petitioner was confined in jail and held incommunicado for a period of approximately six days.

While petitioner was in the private office of Inspector Wiebenga, City Judge Boushe came into that office and informed petitioner that a warrant charging him with murder in the first degree had been issued; that he was entitled to an attorney. Notwithstanding this statement of Judge Boushe to petitioner and to the police officials, petitioner was not permitted to see an attorney or to communicate with relatives for the period above stated.

After the purpose of holding petitioner incommunicado for this period was served, he was taken before Judge Sellers of Division One of the Criminal Court of Shelby County, Tennessee, and arraigned with 14 or 15 other persons. The indictments were read to those persons. Petitioner was not represented by counsel at this arraignment. The public defender was present but there is no showing that he had cummicated with petitioner prior to, at the time of, or subsequent to the arraignment. On the contrary, the record shows that the public defender did not confer with petitioner (R. 1075, 1354, 1356, 1368).

With respect to his initial treatment while in the custody of Memphis police, petitioner thus testified and without contradiction:

> "A. The first thing that Inspector Wiebenga said to me when he started questioning me was, he said, 'You Jew bastard, we want the truth; we don't want what you told those hick Greenville police' " (Record 700).
>
> * * * * * * *
>
> A. I asked the judge—I think it was Judge Boushe —I said, 'Your Honor, would it be possible for me to get a lawyer?' I told him I wanted a lawyer, and he said, 'Of course it will be possible.'
>
> Q. He said, 'Of course it will be possible?'[1]
>
> A. Yes, sir.
>
> Q. Then what happened?

---

[1] The affidavit of Judge Boushe in support of petitioner's statement is as follows:

State of Tennessee
County of Shelby

I, Beverly Boushe, do hereby make oath that I am one of the City Judges of Memphis, Shelby County, Tennessee, and was such at the time of the preliminary hearing before me of Gerard Rosenthal, who has since been tried on the charge of murder in the first degree.

At the time of Gerard Rosenthal's arraignment in the office of Inspector Pete Weibenga, he pleaded not guilty and asked if he could have an attorney and I advised him that he did have the right to an attorney and instructed the said Pete Weibenga to allow and permit him to obtain an attorney of his own choosing. I entered for him a plea of "not guilty" and I have not seen Gerard Rosenthal since that time.

/s/ Beverly Boushe,
/s/ Judge.

Sworn to and Subscribed before me this 4th day of September, 1956.

/s/ Carlton N. Wilkes,
Notary Public.

My Commission Expires:
April 6, 1960.

A. After we left, Inspector Wiebenga told—I think he told Wilkinson, he said, 'Shall we get him that Jew Goldberg?' and they had a good laugh about it.

Q. Were you permitted to use the telephone?

A. No, sir. I asked them down in the city jail to let me use the telephone and they said I would have to get permission from Inspector Wiebenga.

Q. State whether or not you were able to communicate with any of your family or relatives?

A. No, sir, I wasn't allowed to" (Record 701).

2) The initial violation of the right of petitioner to consult with counsel of his choice was the first step in a concerted effort on the part of the prosecution to obtain a conviction at all hazards and without regard to the due process clauses of both State and Federal Constitutions.

Some of the transgressions of fundamental rules of fairness are shown by the following affidavit of petitioner, filed in support of his Motion for a New Trial and corroborated by undisputed evidence:

"**Affidavit.**

"State of Tennessee
County of Shelby

"I, Gerard Rosenthal, do hereby make oath that I am the defendant in case No. 69616, State of Tennessee v. Gerard Rosenthal, in the Criminal Court of Shelby County, Tennessee, which was tried in March, 1955.

"I further make oath that immediately after being returned to Memphis, Tennessee, and when the police started questioning me, I asked for an attorney, which was denied me. I continued to ask for an attorney all during the questioning and even after they had ceased questioning me and carried me to my cell. I asked for permission to use the telephone to call my mother and

father or to call some lawyer. The police officers stated I would have to see someone else because they did not have the authority to let me see a lawyer or use the telephone because I was on the hook and only the detective investigating the case had the authority.

"I was brought before Judge Beverly Boushe and Inspector Pete Weibenga and someone else was there. I asked Judge Boushe if I could have a lawyer and he stated, 'You most certainly can,' and Inspector Weibenga said, 'I guess you want the Jew lawyer, Goldberg.' They (Record page 1075) then carried me back to a cell. I never appeared before the Judge any more and was transferred to the Shelby County jail where I am now incarcerated. I asked for an attorney many times after I reached that jail and finally, after about six days, I wrote a note and it was slipped out by a prisoner to my attorneys, who were recommended by some other prisoners in the jail. I asked those prisoners who their attorneys were and that was the only way I could get in touch with an attorney.

"Several weeks later, I was carried down to the Criminal Court without my attorneys and was unable to get word to them that I was then being arraigned. I was advised that I had just been indicted and that they were having me arraigned. My attorneys were out of town at the time and I had no way of contacting them. However, I was arraigned in their absence and without their knowledge and without my attorney to represent or advise me.

"During my trial, Attorney General Braxton Gandy continually made side remarks in front of the jury concerning my trial and activities. While I was on the witness stand, Inspector Weibenga sat down at a little table to my left side looking me in the face and the jury, and continually mumbled things to me and at

one time while I was testifying, he used a very obscene word, which (Record page 1076) confused me and I hardly knew what I was saying, trying to watch him to see what he was doing, watch the jury, my lawyers and the Judge.

"At the beginning of the trial, every morning the Assistant Prosecuting Attorneys would drag out from a back room the bloody mattress and other bed covers, and place them within three or four feet of the jury and leave them there constantly all the time that said trial was in progress, even after same had been shown to the jury and made exhibits in the case; they were constantly facing the jury and the mattress was never used for any purpose except, in my opinion, to inflame the minds of the jury against me. The thing was so terrible that it even produced an odor and was never used for any purpose except to be seen by the jury.

Gerard Rosenthal
Gerard Rosenthal.

"Sworn to and Subscribed to before me this the 13th day of May, 1955.

Carlton Wilkes,
Notary Public.

"My Commission Expires April 8, 1956.

(Seal)" (Record page 1077.)

3) During the trial of the case in the court below and during the testimony of Inspector Rainey, a highly reputable expert witness for the defense (the trial judge later so stated) Assistant Attorney General Gandy, in the presence of the court and jury, suddenly and without reasonable cause, accused the witness and one of the attorneys for petitioner by saying "this is a frame up," and did thus rudely and improperly interrupt the proceedings and did

thus impute dishonesty—not only on the part of the witness, but on the part of the defense counsel as well—and by such outburst created considerable confusion (R. 908, 909, 910).

Obviously the purpose of Assistant Attorney General Gandy in thus interrupting the examination of the expert witness Rainey was to destroy the effect of this demonstrative evidence.

We quote from the record as follows:

"Q. Inspector, I will ask you to examine the other side of this pillow.

A. I took this pillow and put it down like this (Illustrating) and I held the gun about one foot from it and fired it, like this—

Mr. Gandy: This gun here?

A. No, sir. It was one similar to that. I would have liked to have had that one. I took a gun similar to that.

Q. Go ahead, Inspector. I will ask you to examine the other side of this pillow.

A. I gave Mr. Wilkes this pillow and let him put it under his arm—

Mr. Gandy: Wait a minute. I'm objecting.

A. —and I pointed this gun at him. This pillow here—

Mr. Gandy: Wait a minute, please sir. This is a frame-up.

The Court: Just a minute, gentlemen.

Mr. Wilkes: He said it was a frame.

Mr. Gandy: I am making an objection and Mr. Wilkes won't stop.

Mr. Wilkes: See; he's accusing me and the Inspector of a frame-up.

The Court: Gentlemen of the Jury, you will retire to the jury room, under the same instructions.

Jury Out.

Mr. Wilkes: First, if your Honor please, I want to make a motion for a mistrial. The Attorney General has just stated that it was a frame-up, in the presence of the Jury.

The Court: Mr. Gandy, the Court will warn you again to eliminate these side remarks. As a representative of the State, you are completely out of order. I think you realize that. Bear it in mind, please sir.

Mr. Wilkes: That's a very serious thing when he accused the Inspector and me of a frame.

The Court: I want these things eliminated. We will have no more of those side remarks.

Mr. Gandy: I apologize, your Honor. The State was trying to object, but Mr. Wilkes kept telling Mr. Raney—

Mr. Wilkes: I don't appreciate the Attorney General saying that the Inspector and I were participating in a frame.

Mr. Gandy: I made the remark, if the Court please, to try to stop a fixed-up deal.

Mr. Wilkes: You see, Judge, he says I fixed up a deal.

The Court: Gentlemen—

Mr. Wilkes: And I resent that.

The Court: Mr. Wilkes, when the Court is talking, please don't interrupt, and that applies to the State.

Mr. Wilkes: I apologize to the Court but not to Mr. Gandy.

The Court: All right. Let the record show that when this controversy came, the Jury was ordered out of the room.

Mr. Gandy: If the Court please, while the Jury is out, we want to make an objection to any kind of physical test, pulled off between this attorney and this witness. It has no probative value. We made our

objection while the Jury was in and this witness kept talking and that is why I made that statement. I want to again apologize to the Court.

The Court: Suppose we find out what Mr. Wilkes was about to prove.

Mr. Wilkes: I was expecting to show by the Inspector certain tests that he made with my assistance in connection with powder burns on this pillow and how the gun was placed when the tests were made.

Mr. Gandy: We object to that.

Mr. Haynes: If your Honor please, as I understand the law, an expert can testify as to experiments made and the results produced by such experiments, before a jury.

The Court: Of course, Mr. Raney wasn't there when this happened.

Mr. Wilkes: If your Honor please, we have here a pillow which is identical to the one that was taken from the hotel room, which I think obviously is of the same type, and the pistol used by Inspector Raney, according to his testimony, is the same type of revolver—the same kind of .44. I want Mr. Raney to testify as to the conditions under which this muzzle blast was made.

The Court: Is it your plan to give a demonstration to show what someone else thought about what happened in this room in connection with the imprint on the pillow?

Mr. Haynes: It is the purpose of the defendant to show that the expert made certain experiments.

The Court: He has shown certain experiments."

4) At another point in the testimony of the defendant, when the petitioner had answered a certain question which dealt with petitioner's claim that while he was in custody of the police officials being interrogated, Police Inspector Wiebenga made the assertion, in substance, "we are after

the Jew bastard" and, after petitioner had testified to such statement, this police officer sneered and in a half whisper but in a tone loud enough to be audible to the defendant used a vile, obscene, and ugly word, all to the distraction of the defendant.

The matter was called to the attention of the trial judge during the trial as follows:

> "Mr. Haynes: If your Honor please, we have been advised that when witnesses for the State were testifying, especially on last Saturday, certain members of the jury winked at Inspector Wiebenga and Lieutenant Lux and carried on such activities as that. We thought we would bring that to the attention of the Court.
>
> "Mr. Gandy: The State wasn't aware that anything like that was going on, your Honor, and if anything was done such as that, it wasn't with the State's approval.
>
> "The Court: I might say, Mr. Haynes, that the Court certainly has no knowledge of such matters and if anything like that had come to the attention of the Court it certainly would have been corrected.
>
> "Mr. Wilkes: If your Honor please, I have been advised by Mr. Rosenthal, the defendant, that while he was testifying and after he had said that Inspector Wiebenga, in referring to the defendant, had used the words 'Jew Bastard,' he distinctly heard Inspector Wiebenga say the word 's-h-i-t.' I want to call that to the attention of the Court and say that we certainly object to anything like that.
>
> "Mr. Smith: I think the Court would have heard that if Mr. Wiebenga had said it.
>
> "The Court: The Court did not hear it, Mr. Wilkes" (Record 811, 812).

No investigation of the matter was then or afterward made by the court concerning this matter.

With reference to the use of the ugly and repulsive language, obviously distracting to the petitioner during his testimony, the matter was again called to the attention of the trial judge on the hearing of the Motion for a New Trial.

"Mr. Gwinn: Did these attorneys for the defense or either of them register any sort of protest against any actions on the part of Mr. Wiebenga during the trial?

"The Court: According to the Court's recollection, and from its notes, as the Court recalls it—(interrupted).

"Mr. Wilkes: Just to refresh your Honor's memory, do you remember the time I came up and spelled out a word that I said that he said while Gerard Rosenthal was on the stand? I am asking your Honor if you remember that particular word, that particular thing? I spelled it out. It is an ugly word, and I spelled it out and you stated you had no control over the officers and you couldn't do too much about it. I am just asking you if your Honor remembers that?

"The Court: Not specifically. The Court does recall this, that during the trial of this case, Mr. Wilkes and Mr. Haynes approached the bench and I think made some motions of different types. My notes don't reflect the nature of those, and none of those motions during the trial. As the Court recalls, you did approach the bench on more than one occasion. The Court doesn't remember the word, if you spelled it.

"Mr. Wilkes: I think the record will show it.

"The Court: The reporter was present when you approached the bench. You did it more than once, but the Court has no independent recollection at this moment. You are referring, I assume, to something that pertained to Mr. Wiebenga?

"Mr. Wilkes: Yes, when Mr. Rosenthal was testi-

fying, I think your Honor will remember the little incident I am talking about.

"The Court: You are probably correct in that you did, but the Court just doesn't recall at this time. It doesn't 'click,' but the record which the reporter made at the time will reflect if you did come here, if that did happen" (Record 1373-1375).

5) Attorney General John M. Heiskell testified as a witness for the prosecution. He was prosecuting attorney when the indictment was returned. As above stated, the indictment charged petitioner with murder in the first degree and Tuzzo with being an accessory after the fact. The latter offense carried a penalty of from one to five years (Tenn. Code Annotated, Sec. 39-113).

General Heiskell in his testimony stated that no promises were made to Tuzzo. There was no contention that these promises were made by him or any member of his staff, but Tuzzo admitted that such promises were made by police officers.

General Heiskell also testified that Tuzzo's statements about the killing were corroborated. He knew nothing personally about the facts and, therefore, this testimony was the rankest sort of hearsay.

General Heiskell further testified that the policy of his office was to prosecute the guilty and protect the innocent and that he returned the indictment against petitioner charging him with murder in the first degree because he believed he was guilty of that offense.

6) Counsel for petitioner were unable to learn the names of the first policeman who made the investigation in this case. Counsel for the state objected when an inquiry as to their identity was made during the questioning of Inspector Wiebenga on the hearing of the Motion for a New

Trial. The court overruled the objection, after attorney Wilkes had stated that Wiebenga had formerly testified that he did not know who these two policemen were. The court overruled the objection and their names were then disclosed (R. 1369-1373).

7) The injection of prejudicial extraneous matters into the proceedings. These included:

a) Asking questions concerning evidence that had been excluded by the court (R. 237, 238, 248).

b) Evidence that deceased "loved his little girl" (R. 125).

c) The interference by Assistant Attorney General Gandy with the cross-examination of Tuzzo (R. 335), and the remark of this prosecutor that if counsel for defendant "had nothing to hide they would not make certain requests of the court" (R. 420).

8) A multiplicity of side remarks by the public prosecutor's derogatory to counsel for petitioner and conduct calculated to distract the attention of the jury from the real issues in the cause, this being done despite disapproval of the court. Included in these was:

a) The statement by one of the prosecuting attorneys that counsel for petitioner became excited during the examination of a witness (R. 93).

b) A comment by the public prosecutor, after the court had admitted certain evidence, that "it was not competent for any purpose" (R. 165, 167).

c) Side remarks by Mr. Gandy, who was reproved for making them by the court (R. 229).

d) Asking one of the witnesses if petitioner did not "tell him that he had an uncle who was well known in the New York underworld, and could dispose of

stolen property." Motion for a mistrial resulting from the asking of this question was overruled (R. 236).

e) Statement "if the court thinks its proper", Mr. Wilkes should be permitted to "bulldoze the witness" (R. 238).

f) The remark of Assistant Attorney General Gandy, during the examination of a witness concerning the time of death of the deceased, this being made in a tone of voice not sufficiently loud to be heard by the court but heard by one of petitioner's counsel: "Ask Rosenthal" (R. 635-636).

g) Asking counsel for defendant at the beginning of the examination of the witness Raney: "How much did you pay him?" (R. 897.)

h) Asking the witness Raney if he had not been vouched for a second time by counsel for a defendant in the last two weeks (R. 920).

i) Display of bloody mattress referred to by one of the witnesses as a "terrible thing" throughout the trial (R. 1285, 1286).

j) See Whisenhunt's testimony (R. 1180-1191).

9) Similar conduct was manifested throughout the hearing of the Motion for a New Trial.

Contentions for defense were referred to as "vicious" suggestions (R. 1155).

In one instance when an objection by Mr. Gwinn, one of the counsel for petitioner in the presentation of that motion, was sustained by the court, Assistant Attorney General Gandy said: "Apparently Mr. Gwinn does not want the true facts shown."

The court: "Mr. Gandy, I think that statement is improper" (R. 1152).

10) Aside from the conduct of the public prosecutors having a tendency to destroy the integrity of the trial, the atmosphere in the court room was such as to make a fair trial improbable if not impossible.

a) Police officers, after they had testified, took a position on a level slightly lower than the trial judge and where their conduct could not be readily observed by the trial judge and exchanged smiles, winks, etc., with some of the jurors, made gestures indicative of disbelief in the testimony of petitioner and his witnesses, including a "thumbs-down" gesture during the testimony of petitioner, and other conduct which tended to divert the attention of the jurors from the trial of the case (R. 811, 813, 1210, 1213, 1214, 1240, 1247, 1311, 1312, 1313, 1316).

b) One or more of the jurors apparently slept through a large part of the proceedings (R. 1087, 1088, 1210, 1311).

Such conduct obviously disturbed petitioner while he was testifying.

11) The fiancee of Tuzzo, after she heard that he would probably be a witness against petitioner, came to Memphis to see him and was called upon by police officers at her room in the hotel and ordered to leave town (R. 1122). She did not obey the police order. This witness was Patsy Pelizo and she testified on the hearing of the Motion for a New Trial that Tuzzo told her that there was no plan or design on the part of him and petitioner to kill the deceased (R. 1121).

REASONS WHY THE WRIT SHOULD BE GRANTED.

The denial of a fair and impartial trial by jury, to-wit:

I.

Petitioner was a native of New York City and of the Jewish faith. In the formation of the jury, counsel for the defense stated to the prospective jurors that Gerard Rosenthal was of the Jewish faith and said counsel thereupon did inquire of said prospective jurors if any of them would be prejudiced against petitioner because he is Jewish. In response to said question, each and every one of the said twelve men composing the jury which tried the petitioner answered individually in the negative. Notwithstanding the solemn and sworn statements of all the jurors in answering the above-mentioned inquiry in the negative, after all the evidence in the case was heard, the charge of the trial court delivered, and during the deliberations of the jury one of the jurors stated, in substance, that "owing to the prejudice he held against Jews, he was going to try to lean over backwards in this case" (R. 1082, 1139).

This concealment and misrepresentation by the prospective juror on his voir dire examination prevented counsel for petitioner from exercising the right of peremptory challenge. This is a material and important right. (**Nuchols v. Commonwealth**, 212 Ky. 171, 226 S. W. 2d 796; **Street Railway & Telegraph Companies v. Simmons**, 107 Tenn. 392; **Knights of Pythias v. Steele**, 107 Tenn. 1-8.)

That one of the jurors made the statement complained of during his consideration of the verdict was established by undisputed evidence, but the Supreme Court of Tennessee, in overruling one of petitioner's assignments of error, said:

> "It will be readily conceded by everyone that an accused person is entitled to be tried by a jury of unbiased and impartial jurors."

But it overruled petitioner's assignment of error on the ground that the particular juror was not identified and given an opportunity to take the stand for the purpose of refuting the charge that such a statement was made. It was immaterial whether that statement was made by Juror Jones or Juror Smith. It was an extraneous matter injected into the deliberations of the jury and not only was it established by the affidavit of Juror Lewis, who heard the statement, but by the examination of many of the jurors introduced on the hearing of the motion for a new trial, who testified over the objection of petitioner that it had "no influence on the verdict one way or the other" (R. 1144-1154). All twelve of the jurors were introduced as witnesses for the State on the motion for a new trial but there was no denial of the making by one of them of the statement under consideration. It must therefore be considered as an undisputed fact that one of the jurors made the statement complained of during the consideration of the verdict.

II.

The testimony of General Heiskell and his expression of the opinion that petitioner was guilty of murder in the first degree was an invasion of the right of the accused to be tried upon the law and competent evidence, and these alone. In addition to expressing the opinion that Rosenthal was guilty of murder in the first degree, General Heiskell asserted, in the absence of any personal knowledge on his part, that Tuzzo's statements were corroborated. In approving a verdict based in part upon the testimony of General Heiskell, the Supreme Court of Tennessee disregarded an established rule in that State which requires that the corroboration of the testimony of an accomplice must be some fact independent of the testimony of the accom-

plice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the defendant was implicated in it. **Clapp v. State,** 94 Tenn. 195.

In overruling the complaint concerning the admission of the testimony of General Heiskell on the ground that it was not objected to at the time of its admission, nor made a formal ground of the motion for a new trial, the Court disregarded two established facts and principles, to-wit:

(1) The testimony of Gen. Heiskell was brought to the attention of the trial court and argued at length on the hearing of the motion for a new trial. This is shown by Exhibit A to the Transcript, certified by the trial Judge (R. 1390-1396).

(2) In a case where the death penalty is involved, it is the duty of the reviewing Court, as it has the power to do, to examine the record for any errors affecting the substantial rights of the accused, even though no exception was preserved or the questions are imperfectly presented.

Pearson v. State, 143 Tenn. 390-393;
Hamilton v. State, 97 Tenn. 452;
Watkins v. State, 140 Tenn. 1;
U. S. v. Atkinson, 297 U. S. 757.

Moreover, the testimony of General Heiskell, in view of the fact that he filed the indictment before his resignation as Attorney General and the case was prosecuted by two of his assistants, was the equivalent of the expression of an opinion by the prosecuting attorney that petitioner was guilty of murder in the first degree and such an expression of opinion is not merely a breach of professional propriety and professional ethics, but constitutes prejudicial and reversible error.

Canon 15, Professional Ethics, American Bar Association;

State v. Thayer, 124 Ohio State 1, 176 N. E. 656;
State v. Gunderson, 26 N. D. 294, 144 N. W. 659, 660.

III.

The declaration of Assistant Attorney General Gandy that the testimony of Inspector Rainey, a witness for the defense, was a frame-up between that witness and counsel for petitioner, was an infringement upon petitioner's Constitutional rights of a trial upon the law and the evidence, and these alone.

Speaking of Gandy's inexcusable statement in the presence of the jury and repeated more than once before the jury was excluded, the Tennessee Supreme Court said:

> "It must be conceded that the Assistant Attorney General was entirely out of order in making such remark and that he deserved the reprimand given him by the Court and that defendant's counsel had adequate reason to be incensed personally at such an accusation. The record shows, however, perfectly clearly that the Trial Judge immediately excluded the jury and that a number of jurors testified they did not hear the remark and they wondered why the Judge had excluded them from the room. It seems that the lawyers immediately engaged in quite a confused wrangle and babel of voices among themselves, but no juror testified he heard the remark and they obviously did not understand what was occurring, so we are unable to see where the defendant was prejudiced in any way."

Assistant Attorney General Gandy and Attorney Wilkes were standing within three or four feet of the jury when this declaration was made. It was heard throughout the courtroom. The Judge heard it; the official reporter heard it, and everybody in the courtroom except the jurors ap-

parently heard and understood what was meant. (See the testimony of Whitsenhunt, reporter for the Memphis Press Scimitar, who reported this occurrence the next day. R. 1180-1191.)

Waiving the question of whether the jurors should be allowed to preserve the verdict by impeaching the record, it is respectfully insisted that their testimony is intrinsically destitute of probative value on the question of whether this declaration of Assistant Attorney General Gandy was heard by any of the jurors. It is inconceivable that none of the jurors heard this declaration and their testimony on this point is incredible and without probative value. The record may not be impeached either to preserve or destroy a verdict (4 C. J. S., Sec. 1143, p. 1618).

IV.

A juror may testify as to external considerations affecting the verdict, including potential bias which the law condemns, but not as to how such matters affected the verdict nor to any matter resting solely in the personal consciousness of the juror. In reason III, above, we have insisted that the testimony of the jurors that none of them heard the declaration of Assistant Attorney General Gandy, made under the circumstances disclosed by the record, is absolutely incredible and should not be considered for any purpose whatever.

In the hearing of the motion for a new trial, all the jurors, over the objection of petitioner, were permitted to testify that they based their verdict solely on the law and the evidence and irrespective of any external matters injected into the proceedings. It was flagrant error to permit such testimony. A juror may testify as to external considerations but the true test is not the effect of these but that which it was reasonably calculated to produce and the juror may not testify as to how extraneous matters

affected the verdict nor to any matter resting solely in the personal consciousness of the juror.

U. S. v. Mattox, 146 U. S. 140;
Lindsey v. State, 88 Fla. 135, 101 Sou. 273;
Perry v. People, 63 Colo. 69, 183 Pac. 844;
Wharton on Criminal Procedure, 10th Ed., Vol. 3, Sec. 1665, et seq.

V.

The erroneous instruction that the law presumes true any statement the accused has made against his interest, but the jury may consider as true or false, as it sees fit, any statement made in his own behalf, was confusing and misleading to the jury. On that point, we quote from the opinion of the Tennessee Supreme Court, as follows:

> "By the Ninth Assignment of Error complaint is made of the charge of the Court wherein in substance, the Court charged that the law presumes true any statements the accused has made against himself, whereas any statements made in his own behalf may be considered by the jury as either true or false as they see fit.
>
> "This same assignment of error is dealt with by Judge Burnett in the case of Espitia v. State (decided on the 9th day of March, 1956), in which this Court held that such a charge is erroneous and that case was reversed.
>
> "It appeared, however, in that case that the accused had made admissions against his interest, whereas in the present case there is no evidence of any single instance where the defendant has made any admissions against his own interest; every statement he has made has been self-exculpatory. It is, therefore, not relevant to the evidence in the case, is a mere abstraction, and is not reversible error in the

absence of any showing of prejudice, of which there is none. The assignment is overruled."

In holding that the charge was not prejudicial to the accused, the Tennessee Supreme Court apparently overlooked the testimony of Tuzzo, star witness for the prosecution, that Rosenthal admitted to him that he had shot deceased while the latter was asleep.

If clothing such testimony with the presumption that it was correct is not prejudicial, then we admit that we do not know what would be prejudicial.

At the foundation of our judicial system is the principle that all men stand equal before the law, and if ours is to remain a government of laws, not of men, that principle must be maintained in the administration of justice.

The Fifth Amendment, applicable to Federal agencies, unlike the Fourteenth Amendment, does not contain an equal protection clause, but it is true that an arbitrary discrimination between persons in similar circumstances violates the due process clause of the Fifth Amendment.

Wallace v. Currin (4th Cir.), 95 F. 2d 856, 867.

As stated by the Supreme Court in **Hurtado v. California**, 110 U. S. 516:

> "Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular class."

The principle stated in these cases appears to have been violated in holding that an identical instruction in two cases required the reversal of one and not the other.

VI.

The right to a trial before an impartial tribunal is a fundamental right under both State and Federal Constitutions, and a Federal right to such trial may be asserted

in the motion for a new trial to set aside the judgment of a State Court.

Tumey v. Ohio, 273 U. S. 510;
Jordan v. Massachusetts, 225 U. S. 167;
C. B. & Q. R. R. Co. v. Chicago, 166 U. S. 226;
Manley v. Tart, 187 U. S. 347.

The evidence introduced in the hearing for a motion for a new trial shows a studied effort on the part of the prosecution to disregard fundamental rules of fairness and to obtain a conviction in violation of rights protected by the Fourteenth Amendment and the due process clauses of both State and Federal Constitutions. It also shows a situation that called for strong rebuke and repressive measures on the part of the trial judge, and these were not given and taken.

Berger v. U. S., 295 U. S. 78, 79, 89;
Simms v. Greene, 160 F. 2d 512, 517.

The trial judge took no "strong step to prevent" such conduct on the part of the prosecution when his attention was called to the inexcusable misconduct of one of the prosecutors during the examination of petitioner. He contented himself by saying the court did not hear the remark. The obscene language used by the Inspector of Police, and called to his attention by counsel for petitioner, made so little an impression upon the Court that he did not recall what was said but consulted his notes and found no reference to it, but the record shows that it did occur and when called to his attention, an investigation should have been made and the policeman sternly rebuked.

The court sent the jury out of the room in connection with the declaration of Assistant Attorney General Gandy that the testimony of Inspector Raney was a frame-up between that witness and one of the attorneys for petitioner. Later, and at the suggestion of General Gandy, the

court instructed the jury to disregard the offending statement of the prosecutor. Doubtless, the Assistant Attorney General, reflecting on the matter during the noon recess, had reached the conclusion that his assertion constituted reversible error. If the Assistant Attorney General was to be reprimanded and the reprimand of any value to petitioner, it should have been given when the statement was made and in the presence of the jury. We think the claim of the jurors that they did not know what the court was talking about when it told them to disregard the statement of Mr. Gandy is entitled to little or no credit. Mr. Gandy would not have made the suggestion unless convinced that the jury did hear the offending statement and there is no escape from that conclusion in the light of the record.

CONCLUSION.

The length of this petition precludes a further recital of specific matters whose cumulative effect was destructive of the integrity of the trial.

The trial judge in a criminal case should be something more than an umpire and should exercise diligence to see that the accused gets a fair and impartial trial. The exercise of such diligence requires an investigation of matters of the character disclosed by this record. Such an investigation was not made.

The prosecuting attorney is a quasi-public official and charged with the duty of being fair in his examination and cross-examination of witnesses. It would be an abuse of language to say that the public prosecutors were fair in their conduct of this case.

The same statement could be equally made with respect to the policemen who investigated the case.

It cannot be determined with accuracy what prejudice resulted from holding petitioner incommunicado for six

days and denying his access to counsel during that period. He was entitled to counsel at every stage of the proceedings, and, in keeping him in solitary confinement for the period stated, the policeman violated the plain terms of the Tennessee statute which provides:

> "No person can be committed to prison for any criminal matter until examination thereof be first had before some magistrate." **Tennessee Code Annotated,** Sec. 40-604, 1930 Code, Sec. 11-515.

This statute is quoted in **Anderson v. U. S.,** 318 U. S. 350.

This statute and related statutes are set out in **Cross v. State,** 142 Tenn. 510 (221 S. W. 489), at page 518 of the opinion. They provide that the accused is entitled to the aid of counsel in every stage of the proceedings, that if necessary the preliminary examination should be adjourned for that purpose, and that unless the statute is followed any statement or admission made by the accused shall not be received in evidence. Obviously, there was no examination of petitioner by Judge Boushe in the private office of Inspector Wiebenga. It appears that the purpose of the secret, private appearance in the Inspector's office, instead of the regular courtroom which was in session at approximately the same time, served a very useful purpose for the State in holding petitioner incommunicado and preventing his pleadings for an attorney being made known to the Press and prevented petitioner from having a public hearing.

The zeal that lead the police officers to violate the Tennessee statute was manifested throughout the proceedings and the record shows that it had its origin in racial or religious prejudice. This conclusion is predicated on these reasons:

1) The action of the police official, when petitioner was a helpless prisoner, in calling him a "Jew bas-

tard" and apparently taunting him with the name of a Jew lawyer (Goldberg), instead of allowing petitioner to communicate with counsel, as the police officials were instructed to do by Judge Boushe.

2) The obvious partiality shown Tuzzo by the police officers in instituting the prosecution in this case.

3) The mistreatment of petitioner while he was testifying as a witness, and particularly the whispered and disturbing comments made by Inspector Wiebenga.

4) The statement of one of the jurors concerning his prejudice against Jews during the consideration of the verdict.

5) The conspiracy of concealment on the part of the jurors when asked about this statement and the statement of Assistant Attorney General Gandy, which obviously they heard.

It is the right of the accused in criminal cases to have counsel of his choice at every stage of the proceedings.

Powell v. Alabama, 287 U. S. 45.

And the action of state officials, including the prosecuting attorneys, transgressing the Federal Constitutional rights of the accused is a denial of due process as required by the Fourteenth Amendment to the Federal Constitution.

Mooney v. Holohan, 284 U. S. 103.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the Supreme Court of Tennessee, commanding that court to certify and send to this court for its review and determination on the day certain to be therein

named, a full and complete transcript of the record and proceedings in the case entitled on its docket, Gerard Rosenthal v. State of Tennessee, to the end that said case may be reviewed and determined by this court as provided by Title 28, Sec. 1257 (3), U. S. C. A., and the applicable rules promulgated by this court governing applications for certiorari in criminal cases, and that the judgment of the Supreme Court of Tennessee be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as may seem right and proper.

CARLTON WILKES,
JAMES T. HAYNES,
L. E. GWINN,
Attorneys for Petitioner.

APPENDIX.

Constitutional and Statutory Provisions.

The Fourteenth Amendment to the Federal Constitution Reads as Follows:

"Sec. 1. Citizenship—Due process of law—Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Tennessee Code Sections Whose Mandate the Petition Alleges Was Not Followed in the Arrest, Appearance, and Arraignment of Petitioner Are as Follows:

"Sec. 40-603. **Officials who are magistrates.**—The following are magistrates within the meaning of this chapter: (1) The judges of the Supreme Court, (2) the judges of the circuit and criminal courts, (3) justices of the peace, (4) police and other special justices appointed or elected in a city, village, or town, (5) the mayors and recorders of cities and towns upon whom criminal jurisdiction is conferred by law. (Code 1858, Sec. 5016; Shan., Sec. 6975; Code 1932, Sec. 11514.)"

"Sec. 40-604. **Examination required before commitment.**—No person can be committed to prison for any criminal matter, until examination thereof be first had before some magistrate. (Code 1858, Sec. 5017 (deriv. Acts 1715, ch. 16, Sec. 1); Shan., Sec. 6976; Code 1932, Sec. 11515.)"

"Sec. 40-1101. **Notice of charge and right to counsel.**—When the defendant is brought before a magistrate upon arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate shall immediately inform him of the offense with which he is charged, and of his right to aid of counsel in every stage of the proceedings. (Code 1858, Sec. 5048; Shan., Sec. 7008; Code 1932, Sec. 11547.)"

"Sec. 40-1102. **Time allowed to procure counsel.**—The magistrate shall allow the defendant a reasonable time to send for counsel, and, if necessary, shall adjourn the examination for that purpose. (Code 1858, Sec. 5049; Shan., Sec. 7009; Code 1932, Sec. 11548.)"

"Sec. 40-1103. **Time of examination.**—The magistrate shall, as soon as may be after the defendant appears, or, if the defendant require the aid of counsel, after waiting a reasonable time therefor, proceed to examine the case. (Code 1858, Sec. 5050; Shan. Sec. 7010; Code 1932, Sec. 11549.)"

* * * * * * * *

"Sec. 40-1109. **Examination of witnesses.**—At the examination, the magistrate shall examine the witnesses for the prosecution, on oath, in the presence of the defendant, and such other witnesses as may be produced by the defendant. (Code 1858, Sec. 5056; Shan; Sec. 7015; Code 1932, Sec. 11554.)"

"Sec. 40-1110. **Defendant's right to make statement or remain silent.**—When the examination of the witnesses on the part of the state is closed, the magistrate shall inform the defendant that it his right to make a statement in reference to the charge made against him, or that he may waive the same; and such waiver cannot be used against him on the examination before the magistrate, or on the trial. (Code 1858, Sec. 5057; Shan., Sec. 7016; Code 1932, Sec. 11555.)"

APPENDIX.

Opinion of the Supreme Court.

Gerard Rosenthal

v.

State of Tennessee.

Supreme Court of Tennessee.

April 5, 1956.

Rehearing Denied June 8, 1956.

Prosecution for homicide. The Criminal Court, Shelby County, Berry H. Sellers, J., entered judgment of conviction and defendant appealed. The Supreme Court, Swepston, J., held that evidence sustained conviction.

Judgment affirmed.

1. **Homicide, Key 250.**

Evidence sustained conviction for homicide.

2. **Criminal Law, Key 1158 (1).**

In prosecution for homicide, question of whether defendant was denied the right to counsel was settled so far as Supreme Court was concerned by trial judge when he overruled defendant's motion for a new trial on such ground.

3. **Arrest, Key 70.**

In prosecution for homicide, record did not show that defendant was prejudiced by being held incommunicado for six days after his arrest or by the fact that a preliminary hearing was held in the private office of an inspector instead of in the courtroom, and therefore there was no show-

ing that the constitutional rights of the defendant were violated.

4. **Criminal Law, Key 1086 (14).**

Where record in prosecution for homicide failed to show any objection was made to testimony by a former district attorney that no promises were made to a witness for the state and that witness' statements were corroborated, or any exception preserved with reference to such testimony or that it was made a ground for a motion for a new trial, error, if any, by the trial court in allowing such testimony was not available to the defendant on appeal.

5. **Criminal Law, Key 867.**

In prosecution for homicide, statement by assistant attorney general in the presence of the jury that a certain demonstration being attempted for the jury by a witness for defendant was a frame-up, was not grounds for declaring a mistrial in view of fact a number of jurors testified they did not hear the remark and in view of fact no juror testified that he did hear the remark.

6. **Criminal Law, Key 938 (1).**

In prosecution for homicide, failure of trial court to grant a new trial for newly discovered evidence was not error where record did not show diligence by the defendant or his counsel in discovering such evidence, and the evidence, if offered, would have merely tended to discredit a witness already discredited and thus would not be of so serious a nature as would probably change the result of the first trial.

7. **Criminal Law, Key 1158 (1).**

Upon a motion for a new trial, findings of the trial judge are entitled to the weight of the verdict of the jury and

will not be disturbed where there is material evidence to support his findings.

8. **Criminal Law, Key 956 (10).**

In prosecution for homicide, response of each juror on a voir dire examination that he had no prejudice against persons of the same religious faith as defendant was material evidence supporting finding of trial judge that there was no prejudice by the jurors, and such finding would not be set aside on the basis of an affidavit by one juror that another juror told him he was prejudiced against such religious faith.

9. **Criminal Law, Key 829 (18).**

In prosecution for homicide, where trial court fully charged on reasonable doubt except in respect to its application as to the theory of the defendant, such failure was not prejudicial error.

10. **Criminal Law, Key 825 (1).**

In prosecution for homicide it was duty of counsel to offer a special request for instructions and having failed to do so, they could not complain of trial court's failure to give same.

11. **Criminal Law, Key 1172 (2).**

In prosecution for murder, instruction by trial court concerning admissions against interest by defendant, even if erroneous, was not reversible error in view of fact there was no evidence of any admission made by defendant against his own interest.

12. **Criminal Law, Key 742 (1).**

A jury is the judge of the credibility of all witnesses.

13. **Constitutional Law, Key 268.**
Criminal Law, Key 641 (1).
Jury, Key 31 (11).

In prosecution for homicide, accumulative effect of all errors alleged was not such as to deprive the defendant of a fair trial in violation of the Fourteenth Amendment to the Federal Constitution, or Article I, Section 9, of the Constitution of Tennessee. U. S. C. A., Const. Amend. 14; Const., Art. 1, § 9.

Wilkes & Haynes and Gwinn & Gwinn, Memphis, for plaintiff in error.

Nat Tipton, Advocate General, Nashville, for the State.

Swepston, Justice.

Gerald Rosenthal was indicted for the homicide of Richard Carter, was found guilty of murder in the first degree and sentenced to death by electrocution, from which he has appealed.

[1] There are eleven assignments of error, the first two of which are respectively no evidence to support the verdict and that the evidence preponderates against the verdict of guilty and in favor of the innocence of the defendant.

We have reviewed the evidence under these two assignments and have overruled them. Same is filed with the Clerk of the Supreme Court, but need not be included for publication of this opinion.

The third assignment of error is that "the constitutional rights of defendant were violated by holding him incommunicado for six days after his arrest, conducting a preliminary hearing in the private office of Inspector Wie-

benga instead of in the courtroom, and denying him access to counsel during that period of time; this interference with his constitutional rights, including his arraignment in the second division of the Criminal Court in the absence of counsel employed by him and known to be representing defendant by the public prosecutors."

Counsel did not see fit to discuss this assignment and the only Tennessee cases cited are inappropriate. Giles v. State, 185 Tenn. 429, 206 S. W. 2d 412, was where a confession was ruled inadmissible in evidence because the accused had been questioned by a magistrate whom he considered to be questioning him simply as his friend, and he answered the questions that the magistrate asked him. Poindexter v. State, 183 Tenn. 193, 191 S. W. 2d 445, was a case where, after counsel was appointed for an indigent prisoner, he was given only ten minutes in which to prepare his defense, which, of course, was held to be inadequate. The case of Woods v. State, 99 Tenn. 182, 41 S. W. 811, which is cited as 199 Tenn. erroneously, does not touch any question involved in this assignment.

In Wynn v. State, 181 Tenn. 325, 181 S. W. 2d 332, this Court has held that the investigating officers may detain a suspect for a reasonable length of time, 72 hours in the case cited, for the purpose of making an investigation, pointing out that in the Ashcraft case it was not the detention of the defendants for 36 hours, but was the mistreatment they received which caused the Supreme Court, Ashcraft v. State of Tenn., 322 U. S. 143, 64 S. Ct. 921, 88 L. Ed. 1192, to hold that the confession obtained under those circumstances was inadmissible. See also the case of East v. State, 197 Tenn. 644, 277 S. W. 2d 361. There is no claim to any physical mistreatment in this case.

[2] The only showing at all on the question of whether he was denied the right to counsel is the defendant's own affidavit for the purpose of the motion for a new trial. But

the police officers testified that he said that he did not want to employ private counsel, that the defendant said that he did not want an attorney at that time, but that he would be defended by the Public Defender. The Trial Judge settled that question so far as we are concerned when he overruled the applicable grounds of the motion for a new trial. As a matter of fact, the record reflects that the Public Defender and the City Judge Boushe did see to it that a plea of not guilty was entered for him.

[3] It is not shown in any way that the defendant was prejudiced by anything that was done and it is not amiss to note that in Steele v. State, 189 Tenn. 424, at page 432, 225 S. W. 2d 260, this Court said that there is no obligation on the part of the Trial Court to appoint counsel for one charged with a crime until arraignment on the formal charge against him, because it is only when the indictment is returned that it can be ascertained that such person will be charged with crime and entitled to appointment of counsel. Defendant's counsel suggest that they would have filed a petition for writ of habeas corpus if they had known he was being detained; however, it is purely speculative as to whether or not such would have been effective and we cannot assume that it would have been effective.

[4] The fourth assignment is that the Trial Court erred in allowing the former District Attorney General John Heiskell, who was still in office when the indictment was returned, to testify that no promises were made to Tuzzo and that his statements were corroborated. The record failed to show that there was any objection to this testimony and any exception preserved with reference to it or made a ground or a motion for a new trial. It is not therefore available to the defendant on this appeal. Moreover, in reading the record we think that when the Attorney General made the statement that Tuzzo's statement was corroborated, his attention was directed more to the state-

ment of Tuzzo as to where the gun was concealed in the woods near Tunica, which statement was in truth later corroborated because the gun was found there.

This assignment is overruled.

[5] By the fifth assignment of error complaint is strenuously made that the Court erred in failing to declare a mistrial when the Assistant Attorney General stated in the presence of the jury that it was a frame-up when counsel for plaintiff in error and the expert witness Raney were in the act of trying to make a demonstration before the jury.

It must be conceded that the Assistant Attorney General was entirely out of order in making such remark and that he deserved the reprimand given him by the Court and that defendant's counsel had adequate reason to be incensed personally at such an accusation. The record shows, however, perfectly clearly that the Trial Judge immediately excluded the jury and that a number of jurors testified they did not hear the remark and they wondered why the Judge had excluded them from the room. It seems that the lawyers immediately engaged in quite a confused wrangle and babel of voices among themselves, but no juror testified he heard the remark and they obviously did not understand what was occurring, so we are unable to see where the defendant was prejudiced in any way.

The assignment must, therefore, be overruled.

[6] By the sixth assignment complaint is made of the failure of the Trial Court to grant the new trial for newly discovered evidence. This evidence consisted of the affidavit of a 17-year-old girl who lived down in Mississippi, and with whom Tuzzo was acquainted and had had some dates. She says she came to Memphis and visited Tuzzo in jail and that he told her that the defendant and he did not plot the murder of deceased, and that Tuzzo told her that Rosenthal told Tuzzo that it was an accident.

It is true that this girl came up to Memphis to see Tuzzo while he was in jail, but it appears from the record that she stayed at a second-rate hotel and while there the police of Memphis paid her a call in her room and they testified that there was a man in the room with her at that time.

Defendant relies on Taylor v. State, 180 Tenn. 62, 171 S. W. 2d 403, in which case there was a prosecution for unlawful intercourse with a girl under the age of consent, and the defense was that she was unchaste and a bawd and lewd woman within the meaning of the statute. The Court there held that there was a showing of reasonable diligence, that these two new witnesses were not available at the time of the trial, and the offered evidence was not merely cumulative or of an impeaching nature, but was such that their testimony would probably bring about a different result, because they proposed to testify that each of them had had intercourse with this girl.

We do not think the Court erred in refusing to grant a new trial for two reasons. It appears that this interview took place on January 30, 1955, while both Tuzzo and Rosenthal were in the Shelby County jail and that the trial occurred on March 14 thereafter. To put it mildly, it is passing strange that this girl knew Rosenthal, as the record reflects she did, and she acquired this valuable information from Tuzzo, but did not impart same to Rosenthal or his two lawyers. So far as the record shows, there was no showing of diligence by the defendant or his counsel as is required under Ross v. State, 130 Tenn. 387, 170 S. W. 1026. This Court held in Gentry v. State, 184 Tenn. 299, 198 S. W. 2d 643, 648, that a new trial was properly refused where the newly discovered evidence purported to show that a material witness of the State had committed perjury in his testimony at the trial, quoting from 39 Am. Jur., New Trial, Section 167, p. 173: " 'It is well settled that a new trial will not be granted upon the ground of newly

discovered evidence where it appears that such new evidence can have no other effect than to discredit the testimony of a witness at the original trial, contradict a witness's statements, or impeach a witness, unless the testimony of the witness who is sought to be impeached was so important to the issue, and the evidence impeaching the witness so strong and convincing, that a different result must necessarily follow. * * *.''

The State cites to the same effect 16 C. J., p. 1205, Section 2730, in part, as follows: "The trial court has the right to determine the credibility of newly discovered evidence for which a new trial is asked, and if the Court is satisfied that, on a new trial, such testimony would not be worthy of belief by the jury, the motion should be denied. The newly discovered evidence will not be accepted as ground for a new trial unless the Court can see that its admission on a new trial will probably produce a result more favorable to defendant than the verdict on the original trial. The question is not what the jury might do, but, supposing all the evidence, new and old, to be before another jury, whether they ought to return a verdict more favorable to defendant than the one returned on the original trial." See also 23 C. J. S., Criminal Law, § 1461.

It is insisted by the defendant that this offered testimony is of so serious a nature as would probably change the result. We do not think there is any merit in this insistence, first, because under defendant's assignment of error No. 10 complaining of the failure of the Court to charge on circumstantial evidence it is said that the testimony of Tuzzo was so thoroughly discredited that it did not constitute substantial evidence and with that eliminated the conviction rested solely on circumstantial evidence. So if Tuzzo was already so thoroughly discredited, how can it be said that the result would probably be different if he were again discredited still further by this girl's testimony?

Secondly, even though Tuzzo was impeached, the defendant was likewise impeached and the jury was warranted in believing that the testimony of Tuzzo was corroborated by the other evidence in the case, and that the testimony of the defendant was not so corroborated.

The assignment, therefore, must be overruled.

The seventh assignment of error is based solely upon the affidavit of one juror to the effect that another juror, whose name he did not know and whom he could not otherwise identify, had stated in the presence of the affiant that owing to the prejudice he held against Jews, he was going to try to lean over backwards in the case. It appears that on the voir dire examination each and every juror, when asked about prejudice against Jews, stated that he was not so prejudiced.

This Court is requested to reverse this case on the theory that the defendant did not have a fair and impartial trial guaranteed to him by the Constitution of this State. It will be readily conceded by everyone that an accused person is entitled to be tried by a jury of unbiased and impartial jurors. However, we have this situation. One juror out of 12 makes oath that some other juror whom he was unable to identify has admitted his prejudice against Jews. It must be assumed that if any other juror had heard the statement that such would have been made to appear by affidavit and by putting the juror on the stand for cross-examination. It is also settled by the case of Rader v. State, 73 Tenn. 610, that any juror who is accused of bias or prejudice is entitled to take the stand for the purpose of refuting such a charge. Here the affiant is unable to name or identify this mysterious Mr. X and to give him an opportunity to affirm, deny or explain whatever statement he may have made.

[7] The law is well settled that upon a motion for a new trial the findings of the Trial Judge are entitled to the

weight of the verdict of the jury and will not be disturbed where there is material evidence to support his finding. Thomas v. State, 109 Tenn. 684, 75 S. W. 1025, which is cited in Lindsey v. State, 189 Tenn. 355, 225 S. W. 2d 533, 15 A. L. R. 2d 527.

[8] The Trial Judge had before him the response of each juror on the voir dire examination that he had no prejudice against Jews. This is material evidence to support the finding of the Trial Judge, and we, therefore, will not reverse. The assignment is overruled.

The eighth assignment complains of that portion of the Court's charge in dealing with the theory of defendant where the Court failed to charge the jury that if they had a reasonable doubt as to the theory of the defendant, it would be their duty to acquit. Frazier v. State, 117 Tenn. 430, 100 S. W. 94, is relied on in support of this assignment.

In our opinion any resemblance between the situation existing in that case and the present case is purely coincidental. We have no fault to find with the law as declared in that case with particular reference to the summary 117 Tenn. on pages 464 and 465, 100 S. W. on page 103. However, examination of the opinion will disclose that the Judge gave a lengthy charge as to the theory of the State and of the accused, but as said in 117 Tenn. on page 463, 100 S. W. on page 102 of the opinion, nowhere was any reference made to the doctrine of reasonable doubt except the concluding sentence to this long charge, where a brief general statement of 6½ lines was made with reference thereto, but without the Court having in any way related the doctrine of reasonable doubt to the parts of the charge where the same would be applicable.

[9, 10] On the other hand, in the instant case the Court fully charged on reasonable doubt except in respect to the above omission. We think that this omission was nothing more than meagerness in the charge and that it was the

duty of counsel to offer a special request and having failed to do so they cannot now complain of same. Turner v. State, 188 Tenn. 312, 219 S. W. 2d 188. This assignment is overruled.

[11] By the ninth assignment of error complaint is made of the charge of the Court herein in substance, the Court charged that the law presumes true any statements the accused has made against himself, whereas any statements made in his own behalf may be considered by the jury as true or false as they may see fit.

This same assignment of error is dealt with by Judge Burnett in the case of Espitio v. State, Tenn., 288 S. W. 2d 731, in which this Court held that such a charge is erroneous and that case was reversed.

It appeared, however, in that case that the accused had made admissions against his interest, whereas in the present case there is no evidence of any single instance where the defendant has made any admissions against his own interest; every statement he has made has been self-exculpatory. It is, therefore, not relevant to the evidence in the case, is a mere abstraction, and is not reversible error in the absence of any showing of prejudice, of which there is none. The assignment is overruled.

[12] The tenth assignment complains of the failure of the Court to instruct on circumstantial evidence. This is based on the assertion that since the testimony of Tuzzo is alleged to be so thoroughly discredited that nothing else is left on which to rest the judgment except circumstantial evidence. We find no merit in this complaint. The jury was the judge of and has settled the question of the credibility of Tuzzo and all other witnesses. The assignment is overruled.

[13] Assignment of error No. eleven is a sort of trammel net assignment covering eleven separate items, some of

which have already been ruled on adversely in this opinion and others ruled on adversely by the Trial Court on a motion for a new trial. The insistence is that the accumulative effect was such as to deprive the defendant of a fair trial in violation of the Fourteenth Amendment to the Federal Constitution, and Article I, Section 9, of the Constitution of Tennessee. We find no merit in this assignment and same is overruled.

Let the judgment below be affirmed. It results that defendant will be committed to the Warden of the State Penitentiary and executed as the law directs on June 5, 1956.

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Supreme Court of the United States of America.

OCTOBER TERM, 1956.

No. 453.

GERARD ROSENTHAL,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF OPPOSING CERTIORARI.

MAY IT PLEASE THE COURT:

What is termed a petition for certiorari in the present case in reality seems to complain that during the trial of the petitioner a number of errors were committed and that these were of so grave a nature as to deny the petitioner due process of law under the Fourteenth Amendment. No specific constitutional right of petitioner is set forth as having been flagrantly breached but the insistence is made that the cumulative effect of the alleged errors of the Courts of Tennessee had the effect as above stated.

STATEMENT OF THE CASE.

The petitioner was indicted and convicted of homicide in the Criminal Court of Shelby County, Tennessee, and the death penalty inflicted. His case was appealed to the Supreme Court of Tennessee and affirmed by that tribunal. Its opinion dealing with the alleged errors of law is reported in 292 S. W. (2d) 1. A separate opinion not for publication was filed dealing with the facts. This opinion is to be found in the transcript in this Court.

The respondent will not make a statement of the facts in spite of the fact that that contained in the brief for petitioner is grossly inadequate and ignores all the testimony except his own. For a complete review of the facts we respectfully refer this Court to the Memorandum opinion of the Supreme Court of Tennessee.

The petition in this case is rather confused in its nature and renders a logical reply thereto quite difficult. It seems to ignore a number of well settled principles that have been laid down by this Court, to-wit, that the Fourteenth Amendment does not bring to this Court every ruling made in the course of a trial in the state courts (Buchalter v. N. Y., 319 U. S. 427, and cases there cited). It likewise ignores the rather well settled principle that this Court does not sit to review the action of state courts in the admission of evidence except where the insistence be made that a confession has been extorted in violation of this amendment. Lizenba v. Cal., 314 U. S. 219. There is no suggestion of an extorted confession in this case. Likewise, it conflicts with the rule that the Fourteenth Amendment does not enable this Court to revise judgments of state courts on matters of general law. Enterprise Dist. v. Farmers Canal Co., 243 U. S. 157. It likewise fails to note that the United States Constitution does not guarantee on the part of state courts uniformity of judicial decision nor

freedom from judicial error. Milwaukee Electric Co. v. City of Milwaukee, 252 U. S. 100. To the same effect is the case of Worcester Trust Co. v. Riley, 302 U. S. 292.

With these principles in mind, the various complaints may be examined.

The first insistence is that plaintiff in error was held incommunicado for a period of six days and not permitted to see counsel. While it is true that this Court has held that the absence of counsel is a material factor in determining whether or not confessions have been procured by improper methods, such principle has no application here for the petitioner made no incriminating statement during this detention. Under Tennessee decisions (Wynn v. State, 181 Tenn. 325) officers may detain a suspect for a reasonable time while investigating the case. When petitioner was brought before the committing magistrate for preliminary examination, at which time the only inquiry was the probability of guilt adequate to require him to be bound to the action of the grand jury, a plea of not guilty was duly entered for him by the committing authority and he was advised of his right to an attorney. It is true that he claims that the Police Department declined to summon an attorney for him, but that is denied in that they testify he advised them that he wanted none but proposed to be represented by the public defender. In two briefs filed in the Supreme Court of Tennessee and in the petition here, counsel for the petitioner have completely failed to point out any particular disadvantage that accrued to the petitioner from his lack of counsel. Until they do so, it occurs to the respondent that this Court should take no further notice of this incident.

It is next insisted that the petitioner was arraigned in the Criminal Court of Shelby County in the absence of his regularly employed attorneys. Arraignment in Tennessee as elsewhere consists of bringing the prisoner into open

court, reading the indictment to him and taking his plea. When petitioner was arraigned the public defender entered a plea of not guilty for him and he was remanded to jail. His regularly employed attorneys could have done no more had they been present. The record seems to indicate that they were out of the city at the time and obviously the court was not bound to await their presence before arraigning petitioner. It can not be contended that the petitioner was not represented by counsel at all stages of his trial from the inception of the selection of the jury until the present time. The desperation of his cause most clearly appears from the stress laid upon this type of matter.

There is to be found in the transcript an affidavit of the petitioner with reference to these matters. Suffice it to say that the Supreme Court of Tennessee has consistently declined to treat affidavits of defendants as was petitioner here, as evidence that the contents of the affidavit were true as to matters occurring upon the trial. See Sherman v. State, 125 Tenn., 19. If the Supreme Court of Tennessee declined to pay due homage to the affidavit of petitioner, interested as he was, the respondent respectfully insists that the Federal Constitution does not prohibit the several states from adopting procedural matters so long as there be an opportunity to present such matters for review. In Tennessee the appellate courts consider only such matters as incidents in court as are certified by the trial judge and included in the bill of exceptions which he approves.

Next, complaint is made of a clash in open court between the assistant district attorney and counsel for the petitioner wherein the charge of a frameup was made. As soon as the trial judge caught the import of this clash, he immediately retired the jury, investigated the matter and readily instructed the jury to consider no part of what had occurred. On the hearing of the motion for new trial each of the jurors was called as a witness. Eleven of them tes-

tified that they did not hear this characterization of the testimony of the witness, while the twelfth testified that he did not know whether he heard it or not. All the jurors testified that it made no impression upon them and that they decided the case upon the evidence. The trial judge so found on abundant evidence. Under Tennessee law his finding is conclusive if there be any evidence to support it. Leonard v. State, 155 Tenn., 325. This rule violates no constitutional right of any defendant because the trial judge, seeing the witnesses on an issue of fact that is controverted, is in more advantageous position to determine credibility than any other functionary. So, with the jurors failing to hear this remark and it making no impression on them, it can hardly be a constitutional violation.

It is also claimed that the police officers after testifying were permitted to remain in the courtroom and that they made derogatory remarks toward plaintiff in error while he was testifying. It is not claimed that any member of the jury heard these remarks. The officers deny making them and deny any gestures whatsoever. The trial judge by overruling the motion for new trial found that these matters did not occur and as above stated, his finding has support in the evidence.

Complaint is also made of side bar remarks on the part of the state prosecutors. As this Court will observe from a reading of the record, the trial was bitterly contested at every stage of the proceedings and side bar remarks on each side were free. This same reading of the testimony, however, will disclose that at no time did the trial get out of hand. To the contrary, it was thoroughly under control of the trial judge at all times.

Passing now to the reasons set forth in the petition as to why it should be granted, the first of these is that one juror made affidavit that another juror during the delibera-

tions of the jury made the statement that due to the prejudice he held against members of the Jewish race, he was going to try to lean over backwards in this case. Petitioner insists that since all the jurors upon their voir dire examination denied any racial prejudice, the juror in question concealed his direct and true feelings and that had he disclosed them he might have been challenged for cause or peremptorily. Since all these jurors testified to having decided the case solely and alone upon the evidence and the charge of the court, we respectfully insist that this side remark was of no consequence and but evidenced the desire of a juror conscious of his obligation to discharge that to the fullest. As observed by the Supreme Court of Tennessee, this affidavit did not purport to identify the alleged offending juror and for this reason and because of the presumption of truthfulness in his answers to his voir dire examination, it was not well taken.

Strenuous complaint is leveled at the testimony of a former district attorney who was introduced as a witness by the State. No exception was taken to this testimony when it was introduced and under Tennessee procedure such was necessary for its consideration. See Webb v. State, 173 Tenn. 518; and Troxell v. State, 179 Tenn. 384. Both of these authorities hold that complaints on the admission of evidence must be made in the trial court and may not be raised upon appeal for the first time. However, it is insisted that the trial court had the power to consider this matter and that it was error for it to fail in this respect. We respectfully insist that the 14th Amendment hardly commands that the court of last resort of any state shall exercise its discretion in any particular way in any given case. After all, as said by this Court in Lizenba v. Cal., supra, this amendment leaves the states free to admit such evidence as they may desire.

The next insistence complains of a declaration of the assistant attorney general with reference to certain testi-

mony being a frameup. We have previously discussed this question and will not repeat.

Next, it is insisted that it was error for the Tennessee courts to allow jurors to testify to the considerations that motivated their verdict. We respectfully insist that the 14th Amendment should leave the several states the choice of determining just how far the testimony of jurors may be resorted to either to impeach or to support their verdict. As has been noted by this court, so long as procedural safeguards as existed at common law be retained, the states are free to adopt new and other methods so long as there remains the opportunity to be heard. A state is not required to follow the weight of authority on matters of procedure. Iowa Central R. R. v. Iowa, 116 U. S. 393, makes it rather definite that this is the rule.

The next complaint is that the Supreme Court of Tennessee deprived plaintiff in error of due process when it held that as applied to the facts of this case a certain instruction made by the trial judge did not prejudicially affect his rights and was harmless. Tennessee has a statute (Code of 1932, Sec. 10654), which places upon a defendant the burden of showing that an error was harmful instead of harmless. While it is true in its opinion the Supreme Court did not mention this statute, it is obvious that it must have had it in mind in reaching its conclusion.

Of course, to hold that instructions while erroneous were not prejudicially so is nothing new in the annals of American jurisprudence. That right has been recognized by all the courts of last resort and if such a decision violates the 14th Amendment, its provisions have been transgressed on innumerable occasions. In the earlier portion of this reply, we have referred to decisions of this Court to the effect that consistency of judicial decisions is not required by the 14th Amendment. To these might be added the case of Patterson v. Colo., 205 U. S. 454. After

all, whether an instruction is prejudicial in any particular case is to be determined from a complete appraisal of the entire record. The Supreme Court of Tennessee definitely did this and we respectfully insist that no federal rights were transgressed in this respect.

In Stein v. New York, 346 U. S. 156, in passing upon the admissibility of an alleged confession, this Court used the following language:

> "It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court."

If this be the rule as applied to the admissibility of confessions, a subject upon which this Court has expressed itself rather definitely throughout the years, it would certainly seem that this language was applicable to the conduct of a trial generally and that unless the entire proceedings were so devoid of law and order and form as to nauseate the casual reader, it can not be said that due process has been denied.

The petitioner was accorded an indictment by a grand jury, a trial by a petit jury at which he was represented by experienced counsel of his own selection. His counsel battled for his rights in every vestige of this trial. The Supreme Court of Tennessee held definitely in affirming his conviction that the errors of which he complained were not such. These questions presented to them were matters of state law upon which they were competent to pass. Procedural matters of a state law presents no federal question. See Footnote 2 to Uveges v. Pa., 335 U. S. 437. The overwhelming majority of the matters complained of by the petitioner are of this character.

In conclusion, the respondent respectfully insists that the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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I hereby certify that I have mailed 3 copies of this brief to Hon. L. E. Gwinn, Columbian Mutual Tower, Memphis 3, Tennessee, Attorney for Petitioner.

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